

BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD
OF THE STATE OF KANSAS

Fraternal Order of Police
(FOP), Lodge #37,
Petitioner,

v.

OAH No.
Case No.

14DL0172 PD
75-CAE-8-2013

The University of Kansas
Medical Center,
Respondent.

INITIAL ORDER

Petitioner, Fraternal Order of Police (FOP) Lodge No. 37, brings this action alleging the Respondent, the University of Kansas Medical Center, has engaged in prohibited practices within the meaning of K.S.A. 75-4333(b)(1), (b)(2), (b)(3), (b)(5), and (b)(6) of the Public Employer-Employee Relations Act (hereinafter, "PEERA"). These complaints represent the consolidation of claims Petitioner filed with the Public Employee Relations Board (PERB) on June 6, 2013, and on September 10, 2013, and this Initial Order rules upon them jointly as constituting the above-captioned case.

This matter comes before the Office of Administrative Hearings pursuant to K.S.A. 77-501 *et seq.* The Petitioner appears by and through its counsel, Joe McGreevy and Steve Bukaty. Respondent appears by and through its counsel, Sara Trower.

Findings of Fact

1. On May 5, 2014, the respondent filed an updated motion – at the direction of the presiding officer due to petitioner's additionally filed claim – to dismiss the above-captioned case on grounds that it fails to state a claim or, in the alternative, a motion for summary judgment. On May 21, 2014, petitioner filed its response.
2. The petitioner on June 18, 2014, filed its own motion for summary judgment to which the respondent, on July 10, 2014, filed its response.
3. Having reviewed all briefs and announcing on July 18, 2014, his intended ruling, the presiding officer now presents the matter as ready for disposition.

Discussion and Conclusions of Law

1. Proceedings in this case are governed by the Kansas Administrative Procedure Act (KAPA) at K.S.A. 77-501 *et seq.* K.S.A. 75-4334(a). KAPA requires that all parties be allowed to file pleadings, objections and motions, including motions to dismiss and motions for summary judgment. K.S.A. 77-519(a). Moreover, in PEERA

hearings the presiding officer is mandated to rule upon such motions. K.A.R. 84-2-2(d)(2) (“Motions shall be ruled upon by the board, its designee or the presiding officer...”).

2. Hearings governed by KAPA need not rigidly adhere to the Kansas Code of Civil Procedure (KCCP) at K.S.A. 60-101 *et seq.* For example, presiding officers in KAPA hearings need not be bound by technical rules of evidence. K.S.A. 77-524(a). However, the rules of civil procedure are otherwise relied upon or mandated in KAPA proceedings. *See, id.*, and *see* K.S.A. 77-522(a). This tribunal also notes KAPA’s declaration that its procedural rights and procedural duties “are in addition to those created and imposed by other statutes.” K.S.A. 77-503(b). In *Sheldon v. KPERS*, 40 Kan. App. 2d 75, 80 (2008), in the context of reviewing an administrative tribunal’s order of summary judgment, the court applied well established standards for the granting of summary judgment – standards established via binding precedents interpreting that provision of the KCCP. Therefore, in the instant case regarding a motion to dismiss, if KAPA or PEERA lack the specificity of direction needed to resolve the issue, the relevant provisions of K.S.A. 60-101 *et seq.* and their judicial interpretations will be employed.
3. With regard to the minimum detail to be included in pleadings, state regulations promulgated under the authority of PEERA are somewhat cryptic, specifying only that prohibited practice complaints be submitted to the Public Employee Relations Board (PERB) on forms provided by the board. K.A.R. 84-3-1(b). Accordingly, the PERB complaint form requires petitioners to set forth the “Basis of the complaint” and further directs that the petitioner’s basis “be specific as to facts, names, addresses, locations involved, dates, etc.”
4. KAPA and the KCCP both reinforce this direction by PERB. KAPA provisions are imbued throughout with assurances of Due Process rights by requiring adequate notice and the opportunity to be heard. Although generally instructive, KAPA lacks specific definition for adequate notice in the context of pleading sufficiency. Therefore, it’s helpful to turn to the KCCP for additional guidance – just as the *Sheldon* court did in ruling upon an administratively issued summary judgment. In that vein, *Rinsley v. Frydman*, 221 Kan. 297, 302 (1977), establishes that the civil procedure code requires “a short and plain statement of a claim that will give the defendant fair notice of what the plaintiff’s claim is and the ground upon which it rests.”
5. *Rinsley* acknowledged state code’s conversion from fact pleading to notice pleading in 1964. *Id* at 301. While this authority may not be a high bar for satisfying Due Process notice, it is nevertheless a bar that must be hurdled in order to overcome a motion to dismiss for failure to state a claim under K.S.A. 60-212(b)(6). Further interpretation of this KCCP standard provides that “Under our Code of Civil Procedure, there is no requirement that pleadings state facts sufficient to constitute a cause of action... The plaintiff is “entitled to have the petition interpreted liberally in

his favor with respect to any indefiniteness or uncertainty in its allegations and to have all inferences reasonably to be drawn therefrom resolved in his favor.” *City of Andover v. Southwestern Bell Telephone, L.P.*, 37 Kan. App. 2d 358, 362 (2007) (citations omitted).

6. The provisions of PEERA, KAPA and KCCP are read in harmony with one another. Given the above-noted interplay between these three codes on matters of procedure, the presiding officer is not mandated to follow any one to the exclusion of the other two. Hence, the KCCP’s standards regarding “short and plain statements”, “fair notice” and “ground upon which it rests” are subject to interpretation using not only KCCP judicial precedents, but also principles contained within KAPA and PEERA.
7. The PERB complaint form, authorized by PEERA regulations, may appear to require a degree of fact pleading that surpasses the KCCP. However, K.A.R. 84-1-2(b) requires PEERA regulations to be liberally construed to affect the purposes of PEERA, *i.e.*, to “promote the improvement of employer-employee relations...by providing a uniform basis for recognizing the right of public employees...” K.S.A. 75-4321(b). This is a consideration that could favor either lenient pleading standards or pleading specificity – for example, the cited purpose of PEERA might be frustrated if employers were forced to defend frivolous claims or if there became no uniform basis for recognizing rights due to an abandonment of filing criteria. Consequently, the facts demanded by PERB’s complaint form must be read in conjunction with the KCCP complaint standards.
8. In support of its contention that respondent has violated K.S.A. 75-4333(a), (b)(1), (b)(2), (b)(3), (b)(5), and (b)(6), the petitioner’s consolidated complaint explicitly alleges the following:

June 6, 2013, Basis of Complaint:

Since February 18, 2013, and continuing to date, the above-named employer has violated its duty to bargain in good faith with FOP Lodge 37, the exclusive bargaining representative of the police officers employed by the employer, and has otherwise violated the above-quoted sections of the Act, by failing and refusing to provide to the Union information and documents which it has requested and which it needs in order to meet its duty of fair representation to the members of the bargaining unit with regard to a pending grievance over its appeal of an unsatisfactory performance evaluation.

September 10, 2013, Basis of Complaint:

On April 17, 2013, the University of Kansas Medical Center (KUMC) issued Corporal James (Jim) Gregg his second consecutive unsatisfactory performance evaluation. That evaluation was appealed, pursuant to the parties’ Memorandum of Agreement, to the Associate Vice Chancellor of Human Resources Adrian Fitzmaurice. After an appeal hearing on July 23, 2013, Mr. Fitzmaurice upheld the unsatisfactory evaluation.

On July 29, 2013, Mr. Fitzmaurice notified Corporal Gregg by letter that the Human Resources Department had denied his performance evaluation appeal and approved the KUMC Police Department's recommended termination. On August 9, 2013, FOP Lodge 37 appealed the termination and requested documents and information necessary to meet its duty of fair representation to Corporal Gregg in his appeal. On August 26, 2013, the KUMC denied the FOP's requests for documents and information on the basis that it was under no requirement to do so absent a ruling from PERB.

By refusing to provide documents and information necessary for the Union to meet its fair duty of representation to Corporal Gregg, the KUMC has violated its duty to bargain in good faith and has interfered with rights guaranteed to an employee organization under PEERA. By committing these prohibited practices, the KUMC has also committed derivative violations by discouraging membership in the employee organization and denying the Corporal Gregg his rights guaranteed to an employee under PEERA.

9. One key element lacking in all of petitioner's claims is the linchpin element for all prohibited practice complaints under K.S.A. 75-4333(b), *i.e.*, allegations specific enough to put respondent on notice that the acts were done "willfully". Proof of the willfulness of any alleged misconduct under this statute is an essential element for finding culpability. In the context of PEERA-prohibited labor practices, willfulness has been interpreted to mean "Proof of anti-union animus or of a specific intent to violate an employee's, employees' or the recognized employee organization's rights..." *Fraternal Order of Police Lodge No. 40 v. Unified Government of Wyandotte County/Kansas City*, 75-CAE-3-2006 and 75-CAE-10-2006, p. 39 (PERB, April 9, 2009).
10. The instant petitions make utterly no reference to any anti-union motive that may have influenced respondent's decision to withhold requested information and documents. Petitioner thus implies that the withholding of any information is a violation of PEERA *per se* if it is "information necessary to fulfill its function as a bargaining representative." To support this contention, petitioner cites *Kansas Dept. of Social and Rehab. Services v. PERB*, 249 Kan. 163 (1991), but the facts of that case bear no resemblance to the instant scenario. Petitioner here is not seeking a listing of employee addresses for the purpose of certifying a bargaining unit, as was the employee organization in *Ks. Dept. of SRS*. Rather, petitioner's complaint seeks information that might be relevant to a single employee's challenge to his employer's evaluations and disciplinary actions. The court in *Ks. Dept. of SRS* specifically limited the scope of its decision to the disclosure of employee addresses and made no sweeping conclusion about the accessibility of more granular personnel details for more individualized purposes. The instant scenario does not involve bargaining, negotiations, or the formation of a collective group for any bargaining purposes; it involves the application of procedures that have already been negotiated by a group that has already been certified. Moreover, likely because PERB did not articulate its

conclusions regarding “willfulness” until 18 years later in *FOP No. 40*, there was no discussion of anti-union motive in the *Ks. Dept. of SRS* case at any level of its proceedings.

11. At no time has petitioner acknowledged any duty or inclination to plead the requisite anti-union motive. Petitioner has sought no leave to amend its pleadings and, further, has filed its own motion for summary judgment. Petitioner could have included a short and plain statement alleging respondent’s animus toward, or intent to deprive the rights of, Corporal Gregg or any other covered employee or the petitioning organization either specifically or generally. However, in order to describe the ground upon which the claim rests, a curt statement regarding motive such as “They hate us” would be too short and too plain. PERB has held regarding such motive that, “Initially, the employee must establish that the protected conduct was a ‘substantial’ or ‘motivating’ factor.” *Fraternal Order of Police Lodge No. 40* at p.40. The presiding officer declines speculation about how much more pleading detail about this case would be minimally necessary to provide adequate notice of all essential elements for the claim, rather finding simply that the current petition falls short.
12. Petitioner’s motion for summary judgment stipulates there are no genuine issues of material fact, calling for judgment under the rationale that respondent’s admitted failure to supply requested information represents a denial of PEERA rights *per se*. Petitioner does argue, *e.g.*, that respondent “willfully refused to grant Petitioner access to the records”, but such contentions merely express that the refusal was *intentional* without alleging the anti-union motive or specific intent to deprive rights that is compelled by *FOP No. 40*. In pleading a violation of K.S.A. 75-4333(b)(5), thereby implicating K.S.A. 75-4327(b), petitioner couches the withholding of requested information as a failure to “meet and confer” regardless of any reasons why the information was withheld. Such a posture implies that the petitioner’s right to information is nearly absolute, limited only by what petitioner may assert to be necessary to fulfill its function as a bargaining representative.
13. Petitioner’s chain of logic in this legal analysis is flawed. At least one explicit term within PEERA sets an overarching parameter on parties’ duty to supply information. K.S.A. 75-4327(b) obligates employers to meet and confer “in the *determination* of conditions of employment” [emphasis added]. Both parties in the instant case have met this obligation, the result being an agreed upon MOA which *determined* conditions of employment for the workers, *e.g.*, a process by which worker performance evaluations may be challenged. *See*, Respondent’s Motion to Dismiss, Exhibit 1, Memorandum of Agreement, Article 40. While acknowledging petitioner’s cited precedents regarding a *continuing* duty to meet and confer, even in less formal settings, the agreed process for Corporal Gregg’s appeal of his performance evaluation is not a forum for negotiations to *determine* any conditions of employment. The parties explicitly agreed that such evaluation appeals would not be used for this purpose when they agreed that “This grievance procedure does not apply

to performance evaluations” and then articulated what the appeals process would be for performance evaluations. *Id.*

14. Another statutory parameter is found in the employer rights guaranteed by PEERA. K.S.A. 75-4326 sets forth what its relevant case law describes as “inherent managerial prerogatives”, generally pertaining to employee discipline, direction, promotion, etc. To the extent that petitioner’s requests for information relate to management rights secured by this statute, the topic for which information is sought becomes mandatorily negotiable, and thus subject to “discovery” for purposes of meet and confer occasions under K.S.A. 75-4327, only upon satisfaction of a judicially imposed balancing test.
15. The Kansas Supreme Court endorsed a balancing test used by PERB to determine on a case by case basis whether a given topic of concern in employer-employee relations is a “condition of employment” for which mandatory negotiations shall be held as specified by K.S.A. 75-4327(b). The Court articulated that balancing test as: “If an item is significantly related to an express condition of employment, and if negotiating the item will not unduly interfere with management rights reserved to the employer by law, then the item is mandatorily negotiable.” *Kansas Bd. of Regents v. Pittsburg State Univ. Chapter of Kansas-Nat’l Educ. Assn.*, 233 Kan. 801, 816 (1983). The management rights involved in this balancing test include the provisions of K.S.A. 75-4326:

Nothing in this act is intended to circumscribe or modify the existing right of a public employer to: (a) Direct the work of its employees; (b) Hire, promote, demote, transfer, assign and retain employees in positions within the public agency; (c) Suspend or discharge employees for proper cause; (d) Maintain the efficiency of governmental operation; (e) Relieve employees from duties because of lack of work or for other legitimate reasons; (f) Take actions as may be necessary to carry out the mission of the agency in emergencies; and, (g) Determine the methods, means and personnel by which operations are to be carried on.

This balancing test has been refined in subsequent rulings by PERB to specify the analysis of these factors:

- a. A subject is mandatorily negotiable only if it is significantly related to express conditions of employment.
- b. A subject is not mandatorily negotiable if it has been completely preempted by statute or constitution.
- c. A subject that is significantly related to an express condition of employment is mandatorily negotiable if it is a matter on which a negotiated agreement would not significantly interfere with the exercise of inherent managerial prerogatives. *E.g., IAFF Local No. 179 v. City of Hutchinson, Kansas, Fire Dept.*, PERB Case No. 75-CAE-1-2011, p.11 (May 4, 2012).

16. Central to petitioner's case is its contention that Corporal Gregg's performance evaluation appeal was a "grievance" under K.S.A. 75-4322(u). However, even assuming *arguendo* that Gregg's appeal met this statutory definition, that conclusion would not be dispositive. The salient question is, rather, whether Gregg's "grievance" is a condition of employment that triggers the "mutual obligation personally to meet and confer in order to exchange freely information..." K.S.A. 4322(m). Performance evaluations are not express conditions of employment identified in K.S.A. 75-4322(t). The presiding officer finds, however, that under the specific facts of this case, performance evaluation appeals are significantly related to "grievance procedures" which are an express condition of employment. Therefore, the first factor in PERB's balancing test is successfully met.
17. However, neither the second or third factors of this balancing test are met in this case. Statutory preemption exists in the form of K.S.A. 75-4326. Performance evaluations are essential components of any employer's exercise of inherent managerial prerogatives. An employer's ability to direct, assign, transfer, discharge for cause, relieve from duties, or better advance the mission of their agency are wholly dependent on performance evaluations. No provisions of PEERA, including the need to "exchange freely information", can circumscribe or modify these functions. Thus, the topic of discovery for personnel evaluation appeals is statutorily preempted and fails this part of PERB's test. Additionally, the third factor of this balancing test is failed. Compelling meet and confer negotiations due to Gregg's evaluation appeal would provide grounds for every employee to insist upon the same right whenever they were dissatisfied with their own evaluations and, consequently, represent a significant interference with inherent managerial prerogatives. Because the PERB balancing test thus requires denial of compulsory meet and confer under these facts, the obligation to "exchange freely information" is not triggered.
18. A controlling precedent cited by petitioner also acknowledged limits on what information employers must provide in meeting their negotiation duty under K.S.A. 75-4327. As noted *supra*, the court in *Ks. Dept. of SRS* specifically limited the scope of its decision to the disclosure of employee addresses, affirming PERB's conclusion that employees have no reasonable expectation of privacy regarding their names and addresses for the purpose of bargaining unit certification. The PERB decision that had been appealed by *Ks. Dept. of SRS* included a favorably cited Louisiana decision that reasoned "A privilege may exist if there is a reasonable expectation of privacy the disclosure of which might affect the employee's future employment or cause him embarrassment or humiliation, such as personnel evaluation reports" and PERB then concluded that "The 'reasonable expectation of privacy' test is the appropriate test to be applied..." *National Assoc. of Government Employees v. Parsons State Hospital*, PERB Case No. 75-CAE-18-1988, p.8. Petitioner cites other precedent for broadening the scope of topics that are subject to mandatory meet and confer, but the cases do not address the disclosure of records. One case on which petitioner places emphasis is *Kansas Bd. of Regents, supra*. There, the court affirmed several categories of issues that PERB had decided were subject to mandatory meet and

confer. One such category concerned personnel files, about which the court concluded "...the right of a public employee to review his or her personnel file, upon which many management decisions of great import to the employee may be based, is an appropriate subject for mandatory negotiations. We agree with PERB's discussion and conclusion on this issue." *Id.* at 828. Thus, the relevant issue in that case was employee access to *their own* personnel files, not to information in the files of other employees. Here, when seeking records from respondent to prepare for his evaluation appeal, counsel for Corporal Gregg requested, *inter alia*, "All documents concerning discipline for employees of the KUMC Police Department who have been disciplined for the loss of University property or equipment over the past five years." Petitioner's Motion for Summary Judgment, Exhibit 5, p.1.

19. The MOA in effect as agreed by the instant parties includes procedures for the appeal of performance evaluations – the subject matter of petitioner's June 6, 2013, complaint – and for the appeal of disciplinary actions such as that stemming from respondent's recommended dismissal of Corporal Gregg – an issue included within petitioner's September 10, 2013, filed PERB complaint. Because processes for both types of employee appeals are covered by the MOA, respondent correctly notes that PERB's function is not contract interpretation and construction and, therefore, that each of petitioner's complaints is outside PERB's jurisdiction. *FOP No. 4 v. City of Kansas City, Kansas*, PERB Case No. 75-CAE-28-1993, p.19.

Order

After all inferences reasonably drawn from petitioner's allegations are resolved in its favor, and after concurring with petitioner's assessment that no material facts are in dispute, each of petitioner's filed complaints still fail to state a claim upon which relief can be granted. Furthermore, because petitioner effectively calls for the interpretation of the parties' MOA, a function beyond PERB's jurisdiction, this case is dismissed.

Right of Review

This is an Initial Order issued pursuant to K.S.A. 77-526 which becomes a final order unless reviewed in accordance with K.S.A. 77-527.

The petition for review, stating the basis for the requested review, must be filed with the Public Employee Relations Board, 401 SW Topeka Blvd., Topeka, Kansas 66603 within 15 days after service of this order.



Bob L. Corkins, Presiding Officer
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CERTIFICATE OF SERVICE

On Aug 15, 2014, I mailed a copy of this document to:

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